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Supreme Court, U.S.
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No. 94-1220

In the

Supreme Court of the United States

OCTOBER TERM, 1995

BP CHEMICALS (HITCO) INC.,
Petitioner,
v.
ROBERT and JANET GAYLORD,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal for the State of California, First Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The question presented by petitioner was not an issue at trial or on appeal. Respondents conceded that the military contractor defense applies to products liability cases tried under a "failure to warn" theory as well as those tried under a "design defect" theory. [See Appendix 18, p. 29.] The central legal issue on appeal involving the military contractor defense was whether or not a defendant such as BP Chemicals (HITCO) Inc. could assert the military contractor defense without showing that the particular alleged defect, in this case the absence of warnings or appropriate safety instructions on the use of asbestos materials, was addressed in a military specification.

A second question which was raised by respondents below but which was not necessary to the state court decision is whether or not a subcontractor such as BP Chemicals (HITCO) Inc. which does not itself have a contract with the military may raise the military contractor defense against a suit by an employee of the military contractor injured by a defect in a component material supplied by the subcontractor.

A third question which was raised by respondents below but which was not necessary to the decision of the state court is whether or not a supplier such as BP Chemicals (HITCO) Inc. which supplies a product to a military contractor may assert the military contractor defense when this same supplier has sold the same product on the open market to private individuals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. Robert Gaylord's background and work history. 1

B. Trial. 2

REASONS FOR DENYING THE PETITION 6

I. THE ISSUE RAISED BY PETITIONER WAS NOT IN DISPUTE IN THE CALIFORNIA COURTS 6

A. Petitioners expressly waived below the issue which they seek to assert here. 6

B. Respondents never contested the applicability of the military contractor defense to claims based on failure to warn. 8

C. California case law recognizes the applicability of the military contractor defense to failure to warn claims. 9

II. COURTS ARE NOT SPLIT REGARDING THE APPLICABILITY OF BOYLE TO FAILURE-TO-WARN CLAIMS 10

III. EXISTING LAW ADEQUATELY COVERS THE AREA OF MILITARY CONTRACTORS' TORT LIABILITY 13

IV. PETITIONER'S CONTENTIONS REGARDING DESIGN DEFECT THEORIES WOULD NOT CHANGE THE OUTCOME OF THIS CASE 16

A. Petitioner was not a military contractor and its products were not military equipment. 16

B. Petitioner was held liable on an independent theory of failure to warn. 17

CONCLUSION 18

TABLE OF AUTHORITIES

Anderson v. Owens-Corning Fiberglas Corp. (1991) 53 Cal.3d 987 [281 Cal.Rptr. 528, 810 P.2d 549] 8

Board of Directors of Rotary Intern. v. Rotary Club of Duarte (1987) 481 U.S. 537 [95 L.Ed.2d 474, 107 S.Ct. 1940] 7

Borel v. Fiberboard Paper Products Corp. (5th Cir. 1973) 403 F.2d 1076 14

Boyle v. United Technologies Corp. (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510] 6, 8-10, 12, 17, 18

Brooklyn Navy Yard Asbestos Litigation (2d Cir. 1992) 971 F.2d 831 17

Dorsé v. Eagle-Picher Industries, Inc. (11th Cir. 1990) 898 F.2d 1487 12

Hawaii Federal Abestos Cases (9th Cir. 1992) 960 F.2d 806 11, 18

Jackson v. Deft, Inc. (1990) 223 Cal.App.3d 1305 [273 Cal.Rptr. 214] 9, 11, 18

Johns-Manville Products Corp. v. Superior Court (1980) 27 Cal.3d 465 [165 Cal.Rptr. 858, 612 P.2d 948] 13

Joint E. & S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.) (2d Cir. 1990) 897 F.2d 626 — 11, 18

McGonigal v. Gearhart Industries, Inc. (5th Cir. 1988) 851 F.2d 774 — 9

McKay v. Rockwell International Corp. (9th Cir. 1983) 704 F.2d 444 — 9

Nicholson v. United Technologies Corp. (D.Conn. 1988) 697 F.Sup. 598 — 10

Niemann v. McDonnell Douglas Corp. (S.D. Ill. 1989) 721 F.Supp. 1019 — 10, 14, 16

Ramey v. Martin-Baker Aircraft Co. (D. Md. 1987) 656 F.Supp. 984 aff'd 874 F.2d 946 (4th Cir. 1989) — 11

STATEMENT OF THE CASE

A. Robert Gaylord's background and work history.

Robert Gaylord, who was 59 years old at the time of trial, worked as a machinist at Kaiser Aerospace in San Leandro, California. [Respondent's Brief ("RB") 3, reproduced at Appendix 18.] He joined Kaiser Aerospace in 1956 as a journeyman machinist running the lathes, mills, drills and surface grinder. [Id.] In 1958 he was transferred to the tracer lathe section where he worked from 12 to 14 hours a day, six or seven days a week. [Id.] Kaiser was making missiles at the time, and there were about 50 tracer lathes working in the section, each one about five to 12 feet from the next. [Id.]

Gaylord's job involved finishing the nose cones of missiles with a lathe. [RB 3.] The nose cones were made of plastic impregnated with asbestos, and the lathe processing would release the asbestos fibers into the air. [RB 4.] Gaylord worked on thousands of missile nose cones at Kaiser from the 1950's to the 1980's and when he worked at the tracer lathe, the process would generate a great deal of dust. [Id.]

Johann Roehl, a Kaiser Aerotech employee who worked with Gaylord, testified that on a normal day at Kaiser in the 1960's most of the machines were operating; the plant was operating four shifts with 35 people on the lathes. [RB 4.] Conditions were very dusty, and even when the vacuum was installed, the dust sometimes blew from the vacuum back into the work area. [Id.] Roehl testified that when Gaylord worked as "lead man" and then supervisor, he still worked on the floor of the plant and not in an office. [Id.]

In the spring of 1987 Gaylord consulted several doctors because of persistent colds. [RB 4.] He was eventually diagnosed with terminal lung cancer [Id.]

B. Trial.

As is typical of asbestos-related personal injury litigation in California, this case was bifurcated. [RB 5.] The first phase of the trial concerned the issue of whether Robert Gaylord suffered an asbestos-related disease and, if so, the amount of damage he and his wife had suffered. [RB 6.] The second phase concerned whether or not defendant's product was a contributing cause to that disease. [RB 8.]

Kenneth Cohen, an industrial hygienist, testified that although asbestos fibers are normally too small to be seen, they can become visible at extremely high concentrations. [RB 6.] When a worker such as Robert Gaylord describes a workplace as having a "sustained fog" in the air, he is being exposed to asbestos fibers in a concentration of 60 to 100 fibers per cubic centimeter. [Id.] Although asbestos is usually mixed with other materials in commercial applications, the asbestos fibers typically stay suspended in the air longer than the materials it is mixed with. [Id.]

Kenneth Cohen described how Robert Gaylord's job of finishing the nose cones of missiles with a lathe involved direct exposure to asbestos. [RB 6.] He noted that although the asbestos particles were originally encapsulated, the lathe process broke apart the plastic, releasing fibers. [Id.] Gaylord's exposure was comparable to an asbestos textile worker, an insulator or one overhauling a ship. [Id.]

Dr. Barry Horn, a lung specialist, testified that there is a dose-response relationship between asbestos exposure and lung diseases, and that all of Robert Gaylord's asbestos exposure up to mid-1977 should be considered a contributing factor of his malignancy. [RB 6 to 7.] Dr. Allan Smith, an epidemiologist, testified regarding the evidence linking occupational exposure to asbestos with the development of lung cancer. [RB 7.] Dr. Samuel Hammar, a pathologist, testified that Robert Gaylord's lung tissue contained both squamous cell carcinoma and a great deal of asbestos-related interstitial fibrosis. [Id.] He further testified that the amount of asbestos exposure incurred by Gaylord could itself cause lung cancer regardless of cigarette smoking. [Id.]

After the jury returned a verdict in the first phase finding that Robert Gaylord's cancer was asbestos-related, Gaylord testified in the second phase that he worked on the Advanced Minuteman missile from the middle of the 1960's into the 1980's. [RB 8.] He testified that various missiles were built using the "asbestos overwrap" system, and that in particular he machined about 80% to 90% of the minuteman missiles using the asbestos overwrap method. [Id.]

Bill Vida, who began with Kaiser Aerotech in 1955 as a machinist and then worked in production control from 1961 until he retired in 1991, was responsible for ordering materials for the plant. [RB 8.] He ordered various products from U.S. Polymeric (the predecessor to BP Chemicals) including silicate materials and asbestos bypass tape, also known as ablative tape or "overwrap." [Id.] When these products were received they would be put in storage in their containers and later taken to the plastics department for wrapping. [Id.]

The inspection department looked at the material from U.S. Polymeric when it arrived to verify the quantities. [RB 9.] It then went through the plastic operation and was machined in a raw state by the machinists, who then cured the overwrap in its final configuration. [Id.]

The asbestos tapes manufactured by U.S. Polymeric had been sold to commercial sources long before it was used by Kaiser in its missile cones. [RB 28.] The ablative materials from U.S. Polymeric were, however, used on many missile programs including the Poseidon, the Trident, the Advanced Minuteman, the SRAM nozzle and the SRM-I AND SRM-II. [RB 9.] Kaiser ordered materials on a monthly basis, and in the mid to late 1960's and into the 1970's there were thousands of pounds of the materials coming into the plant, mostly from U.S. Polymeric. [Id.]

Vida had no knowledge of the dangers of asbestos in the 1960's and did not know that the materials from U.S. Polymeric contained asbestos. [RB 9.] He never saw any warnings on the packages from U.S. Poly about the dangers of asbestos to workers. [Id.] There was no secrecy requirements regarding the contents of the materials being ordered, however, and no conflict in production requirements that would have prevented U.S. Polymeric from issuing warnings about the contents of the products that contained asbestos. [Id.]

On the basis of the undisputed evidence presented, the trial court found that the U.S. Polymeric asbestos tape was not military equipment because it had been sold to commercial sources long before it was used in the Kaiser missile programs. Following the presentation of evidence

and argument he case then went to the jury on independent product liability theories of design defect and failure to warn. The jury found that plaintiff had been exposed to defendant's products, that these products were defective and that defendant had failed to warn of the dangers involved in the use of its products. [RB 10.]

Defendant appealed to the California Court of Appeal, raising issues of the sufficiency of the evidence as well as errors in bifurcating the trial between liability and damages and striking the military contractor defense on the design defect issue. [See RB 10 to 11.] Defendant asserted, among other things, that the court should have looked at the entire missile manufactured by Kaiser as the relevant military product, rather than at the asbestos tape supplied by defendant. [See AB 20.] Although the jury had returned a verdict which was independently supported by a failure to warn theory, defendant did not contend that military specifications precluded the giving of warnings to plaintiff and the other Kaiser workers regarding the hazards of asbestos exposure. [See AB 29 to 37.]

The Court of Appeal affirmed the judgment against defendant on the basis that there was no showing whatsoever that military specifications precluded the giving of warnings regarding the hazards of asbestos exposure. [Appendix 20.] Defendant sidestepped this issue on its petitions for rehearing in the Court of Appeal [Appendix 21] and its petition for review in the California Supreme Court [Appendix 24]. Both petitions were denied without comment.

REASONS FOR DENYING THE PETITION

I. THE ISSUE RAISED BY PETITIONER WAS NOT IN DISPUTE IN THE CALIFORNIA COURTS

Petitioner BP Chemicals (HITCO), Inc. asserts that there is an unsettled issue in federal and state courts as to whether the military contractor defense as set forth in *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500 [101 L.Ed.2d 442, 108 S.Ct.2510] applies to claims denominated under state law as "failure to warn" claims, as well as to those described as "design defect" claims. Whether or not this issue is unsettled, it is not presented by this case. Petitioner specifically waived this issue in its efforts to seek review before the California Supreme Court, even though respondent had on appeal expressly conceded that the military contractor defense applies to "failure to warn" claims. Moreover, published California decisions clearly hold that the military contractor defense applies to state law tort claims based upon a failure to warn of product hazards.

A. Petitioners expressly waived below the issue which they seek to assert here.

The jury in this case decided for plaintiffs on independent theories of design defect and failure to warn. [See Appendix 9, "Special Verdict Phase II" Question 1.] Throughout the appellate proceedings below, respondents Robert and Janet Gaylord argued that the verdict in their favor could be sustained on the independent ground that BP Chemicals failed to provide adequate warnings and instructions with their asbestos products, and that there were no military specifications preventing such warnings and instructions. [See Appendix 18, pp. 29-31; Appendix

22, pp. 3-5; Appendix 25, pp. 7-12.] The Court of Appeal upheld the verdict on precisely this basis. [See Appendix 20, pp. 3-9.]

Despite these contentions of respondents and the ruling of the Court of Appeal, BP Chemicals made the following statement in its reply in support of its petition for review in the California Supreme Court:

> "BP Chemicals simply never argued that the government contractor defense should be applied to the plaintiffs' failure-to-warn claims. Instead, the plaintiffs injected this uncontested issue into the proceedings. the application of the government contractor defense to failure-to-warn claims was not even properly before the court on BP Chemicals' appeal. [Citation omitted.] Contrary to plaintiffs' contention, therefore, it was not the issue framed."

[Appendix 26, p. 4.] This concession by BP Chemicals demonstrates that the issue which it seeks to raise before this Court was not presented squarely by BP Chemicals to the California Supreme Court, and in fact was expressly waived by BP Chemicals. Having failed to preserve this issue below, BP Chemicals is not entitled to have this Court grant certiorari on this issue now. See generally *Board of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537 [95 L.Ed.2d 474, 107 S.Ct. 1940].

B. Respondents never contested the applicability of the military contractor defense to claims based on failure to warn.

At the time that the case of *Gaylord v. BP Chemicals (HITCO) Inc.* was being tried in the Superior Court of the City and County of San Francisco, California law was clear that tort claims based upon failure to provide adequate warnings and instructions regarding the use of a product were a variant of product liability claims. See generally *Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987 [281 Cal.Rptr. 528, 810 P.2d 549]. On appeal from the judgment respondents conceded that the military contractor defense as set forth in *Boyle v. United Technologies Corp., supra,* 487 U.S. 500 applied to product liability claims based on both "design defect" and "failure to warn" theories. [Appendix 18, pp. 28-30.] Respondents contended successfully, however, that BP Chemicals had never established that there were any military specifications regulating the giving of warnings regarding the hazards of asbestos products. [Id.]

The California Court of Appeal affirmed the trial court's ruling on the military contractor defense on precisely the ground asserted by respondent, expressly recognizing the applicability of the *Boyle* decision to this area of law. [Appendix 20, pp. 7-9.] Contrary to BP Chemicals' assertions, neither the trial court nor the appellate court ruled that the military contractor defense was inapplicable to failure to warn claims. Petitioner BP Chemicals has thus failed to show that there is any federal question which needs to be resolved in this case, and for this additional reason certiorari should be denied.

C. California case law recognizes the applicability of the military contractor defense to failure to warn claims.

As a reason for granting certiorari, petitioner points to the supposedly "unsettled" nature of the law regarding the applicability of the military contractor defense as set out in *Boyle* to claims based on failure to warn. It is a moot point whether any such conflict exists, because California law is clear that the defense applies equally to both design defect and failure to warn claims.

Federal and state decisions in California recognized the military contractor defense in virtually its present form long before this Court decided *Boyle*. See generally *McKay v. Rockwell International Corp.* (9th Cir. 1983) 704 F.2d 444 and *McLaughlin v. Sikorsky Aircraft Co.* (1983) 148 Cal.App.3d 203 [195 Cal.Rptr. 764]. As one federal court noted, this Court's decision in *Boyle* changed only the ideological basis for the defense as set out in *McKay*, and not its substantive elements. See *McGonigal v. Gearhart Industries, Inc.* (5th Cir. 1988) 851 F.2d 774 at 777.

Following the decision in *Boyle* the California Court of Appeal decided a case which squarely recognized the applicability of the military contractor defense to claims based on failure to warn of product hazards. See *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1315 [273 Cal.Rptr. 214]. Accordingly, if there is a split of authority among federal and state courts on this issue, California courts are among those applying *Boyle* to failure to warn cases. The petition therefore presents no controversy warranting review by this Court.

II. COURTS ARE NOT SPLIT REGARDING THE APPLICABILITY OF BOYLE TO FAILURE-TO-WARN CLAIMS

Petitioner BP Chemicals seeks certiorari based upon the contention that there is a split among federal and state courts regarding the applicability of the military contractor defense as set forth in *Boyle* to product liability claims based upon a failure to warn of product hazards. If there is such a split, it is not evident from the cases cited by petitioner. Leaving aside any cases which may have been decided before this court's decision in *Boyle*, the cases cited by petitioner demonstrate only that in some situations a defendant cannot establish the elements of the military contractor defense.

As petitioner correctly points out, cases such as *Niemann v. McDonnell Douglas Corp.* (S.D. Ill. 1989) 721 F.Supp. 1019 have generally held that the military contractor defense is, on the proper factual showing, applicable to claims based upon both product defect and failure to warn. *Niemann*, however, was a products liability based on design defect; the "failure to warn" aspect of the case was the failure to warn *the government* about the hazards of asbestos. *Id.* at 1024-1025. A case more in point is *Nicholson v. United Technologies Corp.* (D.Conn. 1988) 697 F.Sup. 598 in which a failure to warn case based on the absence of a warning in an aircraft maintenance manual was decided directly under the military contractor defense on the ground that the military specifications controlled the content of the manual. *Id.* at 602-605. The point of interest in *Nicholson* was that this issue was decided by examining the military specifications dealing specifically with the contents of the manual, and not on the specifications dealing with the aircraft

generally. See also *Ramey v. Martin-Baker Aircraft Co.* (D. Md. 1987) 656 F.Supp. 984, aff'd 874 F.2d 946 (4th Cir. 1989), cited by petitioner, in which the district court granted summary judgment to defendants on plaintiffs' design defect claims, holding that these claims were barred by the military contractor defense, but denied summary judgment on the failure to warn claims.

The cases cited by petitioner for the opposite viewpoint, i.e. that the military contractor defense does not apply to failure to warn claims, contain no such holding. In each case the court decided whether or not, on the facts presented, there was any conflict between the federal military specifications and the state law duty to warn. In *Joint E. & S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.)* (2d Cir. 1990) 897 F.2d 626, the Second Circuit Court of Appeals specifically recognized the application of the military contractor defense to failure to warn claims, reversing a summary judgment for plaintiffs on this defense because there was an issue of fact as to whether Navy packaging specifications precluded Eagle-Picher from including product warnings with its asbestos goods. *Id.* at 637; see also *Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305 [273 Cal.Rptr. 214] reversing summary judgment for defendant paint manufacturers on the ground that there was a triable issue as to whether military specifications precluded further warnings. In *Hawaii Federal Abestos Cases* (9th Cir. 1992) 960 F.2d 806 the Ninth Circuit affirmed judgments on jury verdicts, holding that the evidence showed that (1) the defendants' asbestos products were not "military equipment," and (2) independent of the military equipment issue, there was no Navy contract specification preventing warnings from being placed on asbestos products. *Id.* at 812-814; see

also *Dorsé v. Eagle-Picher Industries, Inc.* (11th Cir. 1990) 898 F.2d 1487, upholding a verdict on the ground that defendants failed to show any military specification precluding warnings. None of these cases held that the military contractor defense is per se inapplicable to failure to warn claims; in each case, the court examined the specific issue of whether and to what extent the military specification governing defendant's product covered the area of warnings.

This Court decided in *Boyle v. United Technologies Corp., supra,* 487 U.S. 500, that it would not pre-empt the entire body of state law in the field of tort litigation where military products were concerned, but would instead allow the military contractor defense only in cases in which the state law duty of care conflicted with the duties of the defendant under the particular military contract in question. *Id.* at 507 to 512. In affirming the judgment in *Boyle* on the basis of the military contractor defense, this Court specifically noted that the plaintiffs were claiming a design defect, namely an outward-opening escape hatch rather than an inward-opening one, which was precisely the design required under the military specifications. *Id.* at 509. The lower federal and state courts have followed this Court's decision faithfully. In each case the courts have examined the particular product in light of the defect claimed by plaintiffs and the requirements of the military contract governing that product to determine whether the military design specifications. Although the various federal and state courts have reached different results on different facts with different products, the rule of law applied by each of these courts has been consistent with this Court's holding in *Boyle*.

III. EXISTING LAW ADEQUATELY COVERS THE OF MILITARY CONTRACTORS' TORT LIABILITY

Defendant BP Chemicals asserts that this Court should adopt a uniform rule of law to determine whether claims for design defects include claims based on theories of failure to warn of product hazards for the purposes of the military contractor defense. As can be seen from the preceding section, the law in this area is already uniform. Claims of failure to warn are within the scope of design defects for purposes of the military contractor defense, but the proof of that defense requires a showing that the defect in question, i.e. the failure to warn of a product hazard, was covered by the military specification at issue. BP Chemicals made no showing whatsoever that its predecessor was precluded by military contract requirements from warning about the hazards of asbestos exposure, and thus there was no conflict between the requirements of state law and those of any military contracts.

Petitioner's contention that tort claims in this area are thwarting federal policy is specious. Initially it should be noted that the Gaylords were suing BP Chemicals, the manufacturer of asbestos tape, and not Kaiser, the government contractor and manufacturer of the missiles which used the asbestos tape. Kaiser, of course, was Gaylord's employer and immune under California law from lawsuits by employees except under extremely limited circumstances. See generally, *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465 [165 Cal.Rptr. 858, 612 P.2d 948]. More in point, however, there was no evidence that the asbestos tape posed any particular health hazard once it was incorporated into the missile; the hazard came in using the tape in the process

of manufacturing the missile. Moreover, this hazard was one which was suffered by the very defense workers building the missiles which were necessary to the defense effort. Thus, unlike the situation in *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019, plaintiffs were not contending that the end military product was defective; they were contending that an independently manufactured component which was sold to the military contractor was defective.

The second point to note is that the assertions by BP Chemicals that the hazards of asbestos exposure were not known by manufacturers until the mid-1970's [see Petition, p. 3, 17] borders on the ludicrous. U.S. Polymeric, the predecessor of BP Chemicals, was in the business of manufacturing asbestos tape, and was therefore charged with the knowledge that was readily available to asbestos manufacturers regarding the hazards presented by the use of these products. In *Borel v. Fiberboard Paper Products Corp.* (5th Cir. 1973) 403 F.2d 1076, the Fifth Circuit commented on the state of the knowledge of the asbestos industry on this point as follows:

> The unpalatable facts are that in the twenties and thirties the hazards of working with asbestos were recognized; that the United States Public Health Service documented the significant risk in asbestos textile factories in 1938; that the Fleischer-Drinker report was published in 1945; that in 1961 Dr. Irving Selikoff and his colleagues confirmed the deadly relationship between insulation work and asbestos. . . . During his working years [plaintiff] received no warnings of any kind from three of the six defendants. The other three defendants issued no warnings until 1964-66, by which time adequate warnings would have come too late . . . [*Id.* at 1106.]

Contrary to BP Chemicals' bland assertion [Petition, p. 17], the use of asbestos tape was not "cutting-edge" high technology in the 1960's and 1970's. This was an ordinary product which had inherent hazards well known to the industry but, unfortunately, unknown to the defense workers who used these products.

This Court conducted a careful weighing of public policy in its decision in *Boyle*. Recognizing the military's need to make hard choices between safety and efficiency in the context of military equipment, this Court immunized military contractors from injury claims resulting from these hard choices. At the same time, this Court did not allow contractors to escape all liability whatsoever merely because their products were sold to the military. The parameters of the military contractor defense laid down by this Court in *Boyle* extended only as far as the public policy behind it, and did not insulate contractors from liability for safety hazards which were not part of the military specifications.

BP Chemicals' unstated intent is not to have this Court review some hypothetical difference of opinion among the federal and state courts. Rather, it seeks to have this Court revisit *Boyle* and to preclude any tort litigation of any kind over any aspect of a product or its components once it is determined that the product was purchased by the military and covered by military specifications of any kind. This rule would give every manufacturer of any product connected with the defense industry carte blanche to inflict unnecessary hazards on military and civilian personnel alike, all in the name of efficiency. The public policy factors behind the military contractor defense do not require this Court to revisit *Boyle* as petitioner would wish.

IV. PETITIONER'S CONTENTIONS REGARDING DESIGN DEFECT THEORIES WOULD NOT CHANGE THE OUTCOME OF THIS CASE

Petitioner BP Chemicals has briefed several issues regarding the applicability of the military contractor defense to the area of design defect, even though these issues were not set forth in its "Question Presented" or decided by the California Court of Appeal. Contrary to petitioner's assertions, it was not automatically entitled to a defense verdict even if the case had been reviewed on design defect issues. Moreover, petitioner does not explain how the outcome of this case would have been different if its design defect theories had been reviewed.

A. Petitioner was not a military contractor and its products were not military equipment.

Petitioner's contention that it may hide its component product under the shield of the end military product is also specious. As noted previously, this is not a case like *Niemann v. McDonnell Douglas Corp., supra,* 721 F.Supp. 1019 in which the plaintiffs, the ultimate product users, were suing the manufacturer of the end product (in that case a military jet) because of the hazards presented by one of its components . In this case, the defendant is the component manufacturer whose product was hazardous when used in the manufacturing of the military equipment, but which was not hazardous after that manufacturing was complete. Respondents would submit that in these circumstances petitioner's product must stand or fall on its own.

There was no evidence the U.S. Polymeric had any contract with the military; it was merely a supplier of

asbestos tape to Kaiser, which was a military contractor. Moreover, contrary to petitioner's assertion, there was evidence that U.S. Polymeric had made substantial sales of asbestos tape to commercial sources long before it sold this tape to Kaiser for missile cones. [Appendix 18, RB 28.] Although some courts have held that the military contractor defense applies to design defect claims in this context, see *Brooklyn Navy Yard Asbestos Litigation* (2d Cir. 1992) 971 F.2d 831, 839-840, plaintiffs would submit that the rationale for the defense, i.e. the increased cost to the military due to the need for the contractor to purchase product liability insurance, see *Boyle, supra,* 487 U.S. at 511-512, would be inapplicable in this case because the contractor would need product liability insurance whether or not he sold to the military.

B. Petitioner was held liable on an independent theory of failure to warn.

Whether or not petitioner is correct that the trial court erred in excluding the military contractor defense as to the design defect theories, the fact remains that the jury independently determined that petitioner failed to warn its customers of a deadly hazard associated with the ordinary and routine use of its products. This independent theory resulted in an award of damages which would not have changed even if the design defect claim had been stricken. [See Appendix 9.]

Every court that has directly considered this issue since the *Boyle* decision has treated the theory of failure to warn as a separate and independent basis of liability which must be separately analyzed for the purposes of the military contractor defense. See, e.g., *Brooklyn Navy Yard Asbestos Litigation, supra,* 971 F.2d 831, 839-840; *Joint E.*

& S. Dist. New York Asbestos Litigation (Grispo v. Eagle-Picher Industries, Inc.), supra, 897 F.2d 626, 630-632; *Hawaii Federal Abestos Cases, supra,* 960 F.2d 806, 812-813; *Jackson v. Deft, Inc., supra,* 223 Cal.App.3d 1305, 1317-1318. The judgment, which was affirmed on the basis of the independent theory of failure to warn, would not be affected by a determination that the trial court committed an error in relation to another independent theory.

CONCLUSION

Petitioner BP Chemicals, Inc. has asserted that the judgment in this case should be reversed because of the trial court's error in applying the military contractor defense to respondents' design defect claims. That issue, however, was not the basis for the decision by the California Court of Appeals. At the same time, the only issue presented for review by petitioner in its "Questions Presented" section was expressly waived by petitioner in its briefing before the California Supreme Court.

Even absent this issue of waiver, petitioner has shown no error regarding the state court treatment of the military contractor defense as applied to claims based on a failure to warn. Both federal and state courts have been consistent in their application of this Court's *Boyle* decision to those claims, and on the undisputed evidence petitioner failed to establish a triable issue of fact regarding the application of the military contractor defense to respondents' claims on this theory. Accordingly, no basis for review has been shown.

For the foregoing reasons, respondents Robert and Janet Gaylord respectfully submit that the petition for

certiorari should be summarily denied.

Dated: February 9, 1995 Respectfully submitted,

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